

STATE OF MICHIGAN
COURT OF APPEALS

NANCY L. JACOBSON,

Plaintiff-Appellant,

v

BH ASSOCIATES LIMITED PARTNERSHIP,
MITEX PARTNERS, MANDELL L. BERMAN,
MORTON HARRIS, DP PARTNERS LIMITED
PARTNERSHIP, and SUSSEX PROPERTIES,
INC.,

Defendants-Appellees.

UNPUBLISHED

June 29, 2001

No. 222945

Oakland Circuit Court

LC No. 99-015103-CK

Before: Hoekstra, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's orders granting summary disposition in favor of defendants under MCR 2.116(C)(8) on her claims for breach of an implied covenant of good faith and fair dealing and breach of fiduciary duties. We affirm.

We review the trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on pleadings alone. *Id.* In an action based on a contract, the court may also consider the contract attached to or referenced in the complaint to determine whether a claim has been stated. MCR 2.113(F); *Woody v Tamer*, 158 Mich App 764, 770; 405 NW2d 213 (1987). All well-pleaded allegations in the complaint are accepted as true. *Taylor v Laban*, 241 Mich App 449, 451; 616 NW2d 229 (2000). Also, a court may determine the meaning of unambiguous contract language when deciding a motion for summary disposition. See generally *SSC Associates Ltd Partnership v General Retirement System of Detroit*, 192 Mich App 360, 363; 480 NW2d 275 (1991).

Examining the allegations in plaintiff's complaint in conjunction with the assignment and other contract documents that are considered part of the pleadings under MCR 2.113(F), we conclude that the trial court correctly determined that plaintiff's assigned rights consisted of those specified in ¶ 4 of the September 11, 1993, modification agreement. See *Professional Rehabilitation Associates v State Farm Mut Automobile Ins Co*, 228 Mich App 167, 172-174; 577 NW2d 909 (1998) (scope of assignment is a matter of contract construction). Hence,

plaintiff had a right to share in excess proceeds "[i]f at any time a sale of one or more of the Properties or a refinancing . . . produces net cash proceeds . . ." as set forth in ¶ 4.

We reject, as a matter of law, plaintiff's claim that an implied covenant of good faith and fair dealing relative to the decision to sell or refinance accompanied her assigned right. Under Michigan law, the implied covenant of good faith cannot override an express provision in a contract. *Eastway & Blevins Agency v Citizens Ins Co of America*, 206 Mich App 299, 303; 520 NW2d 640 (1994). "The implied covenant of good faith under Michigan Law . . . neither overrides nor replaces any express contractual rights." *Van Amem Co v Manufacturers Hanover Leasing Corp*, 776 F Supp 1220, 1223 (ED Mich, 1991). See *General Aviation Inc v Cessna Aircraft Co*, 915 F2d 1038, 1041 (CA 6, 1990) (the "obligation of good faith cannot be employed, in interpreting a contract, to override express contract terms."), *Aetna Casualty & Surety Co v Dow Chemical Co*, 883 F Supp 1101, 1111 (ED Mich, 1995) ("Where the express terms of a contract govern the disputed issue, a court should not imply a duty of good faith."), and *Maida v Retirement & Health Services Corp*, 795 F Supp 210, 213-214 (ED Mich, 1992) ("an implied duty of good faith may not be imposed in contravention of contrary express terms.") Where, as here, a contract expressly grants a party complete discretion with respect to particular matters, the covenant of good faith will not be imposed to restrict the exercise of that discretion and thereby override the contract. The fruit of plaintiff's assigned right in the case at bar, namely, a share in excess proceeds in the event of a sale or refinancing, is not destroyed or injured by a decision not to immediately sell or refinance because it is unambiguously stated as a contingent right. Cf. *Blackwell Ford, Inc v Calhoun*, 219 Mich App 203, 210; 555 NW2d 856 (1996).

In any event, we must consider ¶ 6 of the September 11, 1993, modification agreement in determining whether there is an obligation owed by any contracting party to sell or refinance properties. A court reads a contract as a whole and attempts to apply its plain language in determining the contracting parties' intent. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000); *Century Surety Co v Charron*, 230 Mich App 79, 82; 583 NW2d 486 (1998). Construing the September 11, 1993, modification agreement in this manner, we agree with the trial court that no contractual duty to sell or refinance the property was established. Paragraph 6 unambiguously subjects the decision to sell or refinance to the unfettered discretion of the "partnership" or "partners." They may sell or refinance "for any reason at any time and at any price" and may even permit properties to be foreclosed upon.

When a contracting party makes the manner of its performance subject to its own discretion, the law will imply that the discretion be exercised honestly and in good faith. *Burkhardt v City National Bank of Detroit*, 57 Mich App 649, 652; 226 NW2d 678 (1975). However, a lack of good faith cannot override an express contract provision. *Eastway v Citizens Ins Co*, 206 Mich App 299, 303; 520 NW2d 640 (1994); see also *Hubbard Chevrolet Co v General Motors Corp*, 873 F2d 873 (CA 5, 1989). Because there is no contractual duty to sell or refinance under the express terms of the contract, we will not imply a contractual duty to make good-faith decisions on whether to sell or finance as a matter of law. Hence, examining the allegations in the complaint in conjunction with the contract documents, we affirm the trial court's ruling that plaintiff failed to state a claim for breach of an implied covenant of good faith and fair dealing. In light of this holding, it unnecessary to address the alternative arguments advanced by defendants Sussex Properties, Inc., and DP Partners Limited Partnership.

We also conclude that the trial court properly granted summary disposition of plaintiff's breach of fiduciary duties count. MCR 2.116(C)(8); *Spiek, supra* at 337. A fiduciary relationship "arises from the reposing of faith, confidence, and trust, and the reliance of one upon the judgment and advice of another." *Ulrich v Federal Land Bank of St Paul*, 192 Mich App 194, 196; 480 NW2d 910 (1991). A "person in a fiduciary relationship to another is under a duty to act for the benefit of the other with regard to matters within the scope of the relation." *Treadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581; 603 NW2d 816 (1999).

Here, plaintiff's allegations regarding the claimed fiduciary duties are not well-pleaded, inasmuch as plaintiff makes no distinction between the several defendants in pleading the existence of a fiduciary relationship. In any event, the allegations in the complaint, considered in conjunction with the documents that comprise part of the pleadings, are insufficient to plead a fiduciary relationship with any of the defendants pertaining to the claimed fiduciary duties. Hence, the trial court properly granted summary disposition in favor of all defendants pursuant to MCR 2.116(C)(8).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot
/s/ Brian K. Zahra